

- 1) Is claimant's YWCA membership for aquatic exercise a reasonable and necessary medical treatment to cure or relieve the effects of his work injury?
- 2) Is claimant entitled to fees and costs related to the post-award medical hearing and if so, what is the appropriate amount?

FINDINGS OF FACT

On February 16, 2010, claimant sustained a work-related injury involving, *inter alia*, his cervical spine and shoulders. Claimant's neck and shoulders were asymptomatic before his injury, which also caused him to have headaches. Adrian Jackson, M.D., noted in his May 25, 2011 report that claimant's injury contributed to preexisting degenerative changes in his cervical spine and such injury caused his need for medical treatment.¹ Dr. Jackson opined claimant's work accident was the prevailing factor in his "current clinical condition."² Due to the injury, Dr. Jackson performed a two-level surgical fusion of claimant's cervical spine on July 28, 2011. Dr. Jackson placed claimant at maximum medical improvement on November 9, 2011. At the time of his release, Dr. Jackson made no recommendation for additional medical treatment.

In August 2012, claimant joined the YWCA on his own volition in an attempt to find things to help alleviate his symptoms. He testified he would loosen up in a shallow, heated pool, swim several laps in a larger pool, use a Jacuzzi® with water jets on his neck and shoulders, and take some additional laps in the larger pool. He followed this routine three or four times a week. As a result, he noticed improvement in his neck and shoulder pain, as well as his headaches.

On November 26, 2012, claimant returned to Dr. Jackson's office complaining of a gradual increase in symptoms. Derek Barnard, PAC, wrote the report, which Dr. Jackson approved. The report noted:

This patient returns today due to gradual complaints of returning symptoms including neck pain, headaches, and pain across both shoulders. He also describes very subtle residual numbness in his left fingers. This would not be unusual. I do not see anything here that would make me suspicious of his cervical spine. There is nothing that I would pursue as far as reimaging his neck. He was doing some swimming prior to the holidays which seemed to help. I don't believe that there is anything else to do at this point in time for the cervical spine. I encouraged him to continue with his aquatic exercise regimen. He can continue with ordinary duties.³

While claimant acknowledged Dr. Jackson did not write a prescription for a pool membership, he testified Dr. Jackson told him he could not recommend anything better than the aquatic exercise regimen and he should "keep doing that."⁴

¹ Jackson Depo., Ex. 6 at 2.

² *Id.* The "prevailing factor" standard became effective in Kansas on May 15, 2011 and does not apply to this case.

³ P.A.H. Trans., Cl. Ex. 1 at 2.

⁴ P.A.H. Trans. at 10.

Claimant continued the aquatic exercise regimen until February 2013, when his membership expired. He and his wife decided not to renew the membership due to financial reasons. Claimant testified that once he stopped the aquatic exercise, his neck and shoulder pain returned, as well as his headaches.

In response to an inquiry by respondent's counsel, Dr. Jackson stated in an August 14, 2013 letter:

We are in receipt of your correspondence regarding [claimant] and our appointment and discussion with him on November 26th, 2012. Our recommendation for pool exercises was portrayed to [claimant] in a fashion that this is something he needs to pursue on his own outside of the workers compensation environment. This is a very general recommendation that we make to most all of our patients, work related issues or not, with underlying spinal related conditions for long term maintenance.⁵

Claimant currently complains of continued pressure and pain in his neck and shoulders, as well as headaches. Claimant indicated his symptoms are now to the point where he has difficulty doing things he used to do before the accident. Since November 26, 2012, claimant has not seen any doctors or other health care providers for treatment, nor has he taken any medication for this injury. Claimant continues to work regular duty without restrictions or accommodation.

PRINCIPLES OF LAW

K.S.A. 2009 Supp. 44-501(a) states, in part:

In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends.

K.S.A. 2009 Supp. 44-508(g) states:

"Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.

K.S.A. 2009 Supp. 44-510h(a) states:

It shall be the duty of the employer to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, apparatus and transportation . . . , as may be reasonably necessary to cure and relieve the employee from the effects of the injury.

⁵ *Id.*, Cl. Ex 1 at 1.

K.S.A. 2009 Supp. 44-510k(a) states, in part:

At any time after the entry of an award for compensation, the employee may make application for a hearing, in such form as the director may require for the furnishing of medical treatment. . . . The administrative law judge can make an award for further medical care if the administrative law judge finds that the care is necessary to cure and relieve the effects of the accidental injury which was the subject of the underlying award.

Case law does not precisely define medical care or treatment. Treatment is "[a] broad term covering all the steps taken to effect a cure of an injury or disease; including examination and diagnosis as well as application of remedies."⁶

ANALYSIS

1. Claimant's pool therapy is reasonable and necessary medical treatment to relieve the effects of his work injury.

The Board affirms the post-award medical Award. Claimant, through what was initially self-directed swimming and use of a hot tub and/or sauna, is relieving the effects of his work injury. Dr. Jackson endorsed claimant's routine as beneficial. As noted above, Dr. Jackson's November 26, 2012 report states:

He was doing some swimming prior to the holidays which seemed to help. I don't believe that there is anything else to do at this point in time for the cervical spine. I encouraged him to continue with his aquatic exercise regimen.

Claimant's swim routine relieves the effects of his injury. Dr. Jackson agrees. Granting claimant a gym membership for such purpose was within the judge's purview.

Respondent asserts various concerns, including: (1) self-directed pool exercise is not medical care; (2) pool exercise is not reasonable and necessary; (3) Dr. Jackson indicated claimant should pursue such activity on his own outside the workers compensation environment; (4) Dr. Jackson tells all of his spine-injured patients to participate in pool exercises; and (5) the judge erred in interpreting the post-award medical statute to allow claimant to pursue self-directed aqua therapy without a prescription. These arguments are addressed below sequentially.

First, self-directed pool exercise or aqua therapy, under the facts of this case, is medical treatment. As indicated in *Hedrick*, medical treatment is a broad term. While not a cure, claimant's pool exercise is a remedy that relieves the effects of his injuries.

⁶ *Hedrick v. U.S.D. No. 259*, 23 Kan. App. 2d 783, 785, 935 P.2d 1083 (1997) (quoting Black's Law Dictionary 1502 (6th ed.1990)).

Second, claimant proved his pool exercise or aqua therapy is reasonable and necessary to relieve the effects of his accidental injury. The reason claimant has pain and is pursuing pool exercises is due to the effects of his accidental work injury. Claimant testified his pool routine helps relieve his symptoms. Dr. Jackson, in writing, encouraged claimant to continue with his swimming. There is no evidence claimant's pool exercise routine is unreasonable or unnecessary.

Third, whether Dr. Jackson opined claimant's pursuit of pool exercise should be pursued inside or outside of the workers compensation arena is not his decision to make. Such decision is for the judge, the Board and the appellate courts.

Fourth, the fact Dr. Jackson encourages all of his patients to participate in pool exercises, is irrelevant. The relevant question is whether claimant's activities at the YWCA cure or relieve the effects of his work injury. Moreover, Dr. Jackson telling all of his spine injury patients to engage in pool exercises does not somehow sever the work-related connection between claimant's symptoms and his injury. The doctor telling all spine patients to engage in pool therapy seems to make the treatment not just reasonable and necessary, but mundane and routine.

Fifth, the judge did not read language into K.S.A. 2009 Supp. 44-510h(a) that is not contained in the statute. The statute requires the employer to provide the services of a health care provider and medical treatment. Respondent contends the statute only permits medical treatment resulting from a healthcare provider's prescription or recommendation, but not medical treatment from a non-healthcare provider or self-prescribed medical treatment. Respondent argues the judge erroneously interpreted the statute to allow claimant to self-direct his treatment. However, this argument need not be addressed. The statute does not prohibit a judge from awarding treatment which, while initially self-sought by a claimant, is reasonable, necessary and endorsed by a physician, as is the case here.

The peculiar facts of this case demonstrate the gym membership was reasonable and necessary medical treatment to relieve the effects of claimant's work injury.

2. The Board affirms the award of attorney fees and costs.

The Board affirms the judge's awarding claimant \$872.25 in attorney fees and costs.

Claimant requests the Board award additional attorney fees incurred as a result of this appeal. The Board has routinely held that where a party requests attorney fees for an appeal, the matter should be remanded to the judge for a hearing.⁷

Therefore, the issue of whether claimant is entitled to attorney fees associated with this post-award medical appeal is remanded to the judge for hearing.

⁷ See *Arnold v. Morning Star Ministries*, No. 270,628, 2011 WL 4011661 (Kan. WCAB Aug. 4, 2011) and *Edwards v. Jim Mitten Trucking, Inc.*, No. 199,988, 2008 WL 2673151 (Kan. WCAB June 30, 2008).

CONCLUSIONS

The awarded gym membership was reasonable and necessary medical treatment to cure and relieve the effects of claimant's accidental injury. The award of attorney fees is affirmed, but claimant's request for attorney fees in this appeal must be decided in the first instance by the judge.

AWARD

WHEREFORE, the September 30, 2013 Award is affirmed. Any request for attorney fees for this appeal must be initiated with the judge.

IT IS SO ORDERED.

Dated this _____ day of December, 2013.

BOARD MEMBER

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